SEP 22 1944

Supreme Court of the United States

OCTOBER TERM

No. 490

BERT ERDMAN,

Libellant-Petitioner,

vs.

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

WARNER PYNE,
LEO J. BONDY,
J. NORMAN LEWIS,
Proctors for Libellant-Petitioner.

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UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Bert Erdman for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of the Matter Involved.

This application involves a decision of the Second U. S. Circuit Court of Appeals in an order of June 27, 1944 for the issuance of a mandate for reversal of a final decree in admiralty of the District Court, Southern District of New York. The suit was brought to recover for personal injuries sustained by the libellant-petitioner while a passenger on the respondents' steamship *California*. The United States was made party respondent to permit

proceedings on principles in rem, as title to the vessel was transferred to the government after the accident. The District Court (CONGER, *J.*) found that both the libellant and the respondent operators of the steamship had been negligent, and under admiralty practice permitting division of damages awarded libellant half damages in the sum of $20,757.53. The Circuit Court of Appeals (Presiding Judge LEARNED HAND dissenting) reversed the District Court and ordered the libel dismissed.

Jurisdiction.

The jurisdiction of this court in invoked under Sec. 240 as amended, of the Judicial Code (28 U. S. Code, Sec. 347[a]).

The Facts.

On January 10, 1938 libellant was a passenger on the steamer *California* on a trip from New York to San Francisco. On the afternoon of that day for about half an hour he had been on deck in bathing trunks (fol. 426) in the vicinity of an outdoor swimming pool which he then decided to enter (Finding 14, p. 869).

The pool had been built into a cargo hatch opening (Finding 6, p. 867). There was a platform around the sides and at both ends of the pool, the platform being higher than the deck, and at the rear end of this platform on each side there was a narrow stairway of two steps from the deck to the platform. Along the lateral sides and outer edge of this platform were wooden stanchions through which holes had been drilled at the top, and a three inch cotton rope was stretched through the holes from the forward end of the pool to the last or aftermost stanchion, which was at the forward side of the top of the two steps. This cotton rope was in place at all times.

Another and shorter rope was provided, a removable one, "which could be taken down and put up as desired" and which when up ran from the last stanchion across the top of the steps to the bulkhead at the after, or rear end of the platform (Findings 9, 10, 11, p. 868). This short rope, about five feet in length, was taken down when the pool was in use, but was intended to be up when the pool was not in use (Finding 10, p. 868). No other means of barring access to the pool was employed or claimed to have been employed by respondents. No signs or notices of any kind were posted at or near the pool to warn passengers that the pool was not to be used, and there were no regulations posted informing passengers when or under what weather conditions the pool might be used (Findings 36, 37, p. 872). There were no markings of any kind on the sides or ends of the pool, or anything else to indicate the depth of the water in the pool at any time (Finding 17, p. 870).

Libellant after deciding to enter the pool walked along the deck to the steps leading to the platform on the starboard side of the pool, there handed his bath robe and slippers to a ship's steward named Jensen, who was stationed at the pool (fols. 442, 179, 180, 807); and then walked across the platform to a ladder which led from the after, starboard side of the platform down into the pool. "In entering the pool the libellant did not hurry or jump in without looking" (Finding 23, p. 870). "After proceeding down the ladder, libellant reached his foot into the water, and then called back to a friend that the water was fine or was not cold" (Finding 24, p. 870). All of these movements were conceded by Jensen to have been in his immediate presence and observation (fols. 1539-40, 1548-50); and Jensen the court found was only "about 8 or 10 feet away from libellant" when he entered the pool (Finding 44, p. 873).

The sea had been rough during the morning of the day the libellant entered the pool, and was rough at the

time he entered it. During the morning there was a "strong breeze and rough sea" (Finding 20, p. 870). "There had been a storm previously which had subsided but which left the sea rather rough with a strong wind blowing" (Finding 19, p. 870). For the four afternoon hours immediately preceding the time, about 4 p. m., of the libellant's injury, there was a "strong easterly wind" and a "rough easterly sea" and the vessel was "rolling and pitching moderately" (Findings 20, 55, pp. 870, 874).

At the time the libellant entered the pool, it was, as he knew, being filled, and it "was about half full and had between 3½ and 5 feet of water in it" (Findings 15, 16, p. 869).

After calling back to his friend about the condition of the water, libellant then faced the water in the pool, with his hands in back of him, and entered the water by what may be termed a 'flat' or 'shallow' dive" (Finding 27, p. 871). He had taken only a few strokes when he was thrown against the side of the pool (Finding 33, p. 872) so heavily that his neck was broken and he sustained painful, permanent injuries (Findings 61, 62, pp. 875, 876).

The Decision of the District Court.

The District Judge found that the respondents were negligent because: (1) None of the officers or crew of the steamship gave any warning to libellant. (2) There was no sign or warning to passengers not to use the pool, but on the contrary there was continuous invitation to passengers to use it. (3) There was no system of looking after the safety of passengers in regard to the pool, no regulations posted informing passengers when or under what weather conditions the pool might be used. (4) No effort made either by the pool steward Jensen; or by the master-at-arms, whose particular duty it was to see to the safety of passengers; or by the master or any other officer

of the ship to warn libellant against going into the pool, or warn him in any way as to any danger which might be encountered in going into the pool (Findings 35 to 53, pp. 872-4).

With respect to the question as to whether "the short length of rope which was intended to be across the steps leading up to the pool * * * was up or down," the court found the testimony "so conflicting that I cannot and do not find whether the rope was up or down," (Finding 26a, p. 871). Nevertheless the court further found that it was "unimportant" whether this rope was up or down because it did not constitute a warning or notice that "the pool was not to be used, or that there was any danger in using the pool, and the rope did not and would not bar access to the pool" (Conclusion 6, p. 877).

Libellant was held guilty of contributory negligence (Conclusion 9, p. 878) because, although he was a "landsman and not a sailor" and accordingly "was unaware of the inherent dangers of going into this pool," as "the danger" was "not too apparent to him," nevertheless since the water in the pool was in an agitated condition and the pool was being filled "he must have known that it was somewhat dangerous" even though "he may not have known the degree of danger" (Finding 54, p. 874).

The Decision of the Circuit Court of Appeals.

Because libellant admitted that if the short piece of rope (which respondents' witnesses testified was present across the top of the steps but which petitioner's witnesses testified was not present) was in position across the steps he would not have passed it to go into the pool, the majority of the judges of the Circuit Court of Appeals held that the failure of the libellant to prove that the rope was not in position was a failure of libellant to prove *any*

negligence (p. 906) and deprived libellant of any right of recovery, because, if the rope was in position, it constituted notice to the libellant that the pool was not open for use and that libellant was forbidden by the presence of the rope to use the pool; that "Such information, however conveyed to him, fulfilled the respondents' duty to this libellant"; that "the respondents having withdrawn any general invitation to passengers to use the pool and having brought home to the libellant that fact by means of the rope were under no duty to warn him of the dangers he would probably encounter in using it" (p. 906). The respondents were under no duty "to advise him of specific risks he would incur by going into the pool" and "under no duty to warn him of the danger he would probably encounter in using it" (p. 906).

Presiding Judge Learned Hand did not agree with his associates in their conclusions that no further duties were owed to the libellant by respondents after he had passed the rope, which they assumed was in position. In a dissenting opinion, he stated that even though the rope was in position and libellant passed it, nevertheless this disregard of the notification given to the libellant by "implication" (p. 907) not to go into the pool, did not forfeit all rights which libellant had as a passenger to have his safety protected by respondents nor did libellant by passing the rope and proceeding to the pool incur every type of risk which might follow from his use of the pool. He said:

> "A man may take some chances without taking other chances such as those of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he went where passengers should not go; and not with foreseeing that when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger" (p. 908).

The Presiding Judge stated further that when Jensen, the ship's steward stationed at the pool, failed to warn libellant not to go into the pool "it was a failure in that extreme care which the law exacts of a carrier of passengers. The ship having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908).

The Question Presented.

Does a steamship passenger by negligently placing himself in a position of danger thereby discharge the carrier from any duty of exercising any care with respect to the passenger's safety thereafter, even though the carrier's employees see the passenger in such position of danger, realize the nature of the danger and have sufficient opportunity to warn him fully of the nature and extent of the danger?

Reasons for Allowance of the Writ.

The majority of the Circuit Court of Appeals has decided an important question of law not only in conflict with the decisions of this court but also in conflict with decisions of the Circuit Courts of Appeals for the First and Ninth Circuits, and its own prior decision, namely: *Chunn* v. *City and Suburban Railway of Washington*, 207 U. S. 302, and similar decisions of this court; the decision of the Circuit Court of Appeals for the First Circuit in *The Steam Dredge No. 1*, 134 Fed. 161; the decision of the Circuit Court of Appeals for the Ninth Circuit in *Weisshaar* v. *Kimball Steamship Co.*, 128 Fed. 397; and the decision in *The Arabic*, 2 C. C. A., 50 Fed. (2nd) 96.

The necessary result and effect of the decision of majority of the Circuit Court of Appeals is a holding that

when a passenger on an ocean steamer has by his own act of negligence placed himself in a position of danger, the carrier is under no duty thereafter to take any steps whatever to look out for the safety of the passenger, even though the dangerous nature of his position is known to and observed by the carrier's employees and sufficient opportunity is afforded to them to take action and notify the passenger of the full nature and extent of the danger, of which full nature and extent the passenger himself is unaware.

WHEREFORE libellant-petitioner prays that this Honorable Court shall issue a Writ of Certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify the record herein, so that this Honorable Court may review this cause and act therein as of right and according to law ought to be done, and that your libellant-petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just.

New York, September 21, 1944.

BERT ERDMAN,
Petitioner,

By WARNER PYNE,
Proctor.

WARNER PYNE,
LEO J. BONDY,
J. NORMAN LEWIS,
Proctors for Libellant-Petitioner.

BRIEF IN SUPPORT OF PETITION

POINT I.

The fact that a passenger has placed himself in a position of danger, even by reason of his own act of negligence, does not discharge an ocean carrier from its continuous duty of taking whatever steps it can to prevent the passenger from receiving injury because of his position of danger.

The difference in the degree and duty of care owed by a carrier to a passenger as stated in the instant case in the majority opinion of the Circuit Court of Appeals, namely "that common carriers are bound to exercise a high degree of care" (p. 906), from the degree and duty as stated by the Presiding Judge in his dissenting opinion, namely "extreme care which the law exacts of a carrier of passengers" (p. 908); is we believe of importance because it illustrates the error which, variously expressed, permeates the majority opinion, and the conflict of that opinion with the decisions of this court, of other Circuit Courts of Appeals, and of its own prior decisions.

The carrier's duty of care for the safety of passengers at all times is thus expressed in *Pennsylvania Company* v. *Roy,* 102 U. S. 451, at 456:

> "The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. * * * For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."

This duty as thus defined is equally applicable to common carriers by sea and enforced in admiralty causes of action (*The Arabic,* 34 Fed. [2d] 559, at 562, aff'd 2 C. C. A., 50 Fed. [2d] 96; *Boston & Yarmouth S. S. Co.* v. *Frances,* 1 C. C. A., 249 Fed. 450; *The Garden City,* 26 Fed. 766, at 774; *Admiral Peoples,* 9 C. C. A., 1935 Am. Maritime Cases 765; *The Manhasset,* 19 Fed. 430, 433).

For even the slightest neglect in the discharge of this duty the carrier is liable: *City of Panama,* 101 U. S. 453, 462; *Philadelphia & Reading RR. Co.* v. *Derby,* 55 U. S. 486.

The fact that a passenger has placed himself in a position of danger by his own act of negligence does not discharge the carrier from its duty of continuing to exercise this highest degree of care placed upon it to look out for the safety of passengers at all times, nor does it reduce or lessen the duty in any way. In *Chunn* v. *City and Suburban Railway of Washington,* 207 U. S. 302, in which a female passenger had placed herself in a position of danger by her own negligent act, this court said at page 309:

> "If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The right of a passenger to recover from a carrier despite the fact that the passenger has by his own negligence exposed himself to danger is thus stated in Hutchinson on Carriers, 3rd Edition, Vol. 3, Sec. 1173, page 1368:

> "* * * such right will not be barred if the carrier, after becoming aware of the exposed position of the passenger, failed to exercise a reasonable degree of care and caution to avert the injury. The

> imprudence of the passenger in placing himself in a situation of peril does not dissolve the contract of carriage, nor relieve the carrier from the duty of protection which the passenger may rightfully demand under it. If, therefore, the passenger negligently exposes himself to danger, and the carrier knows, or under the circumstances ought to know of the danger to which he is exposed, it is the carrier's duty to exercise such reasonable care and caution as the situation of the passenger demands to protect him from injury. And if, with knowledge that the passenger has assumed a position of danger, the carrier omits to exercise such reasonable care and caution to avoid causing him injury, such omission will be considered in law the proximate cause of the injury, and the carrier will be liable, notwithstanding the prior negligence of the passenger."

In *Weisshaar* v. *Kimball S. S. Co.,* 128 F. 397, a passenger boarded a small boat to be taken out to a steamer. The boat was heavily overloaded and the officer in charge of the boat warned the passengers of the danger and ordered that some get out. This was done but the passengers again boarded the boat. The officer in charge of the boat again warned the passengers of the danger but when they refused to leave he nevertheless caused the boat to leave in its overloaded condition. The boat encountered heavy seas, capsized, and several of the passengers were drowned. The lower court held the death of the passenger involved in the suit was due solely to his own negligence in boarding this obviously overloaded boat in direct disobedience of the instructions of the officer and in spite of the officer's warning not to do so because of the danger. The Circuit Court of Appeals for the Ninth Circuit, however, in modifying the opinion of the District Court held that the passenger's negligence in staying in the overloaded boat and not getting out when instructed to do so did not defeat a recovery in view of the officers subsequent

neglect to avoid the consequences of the passenger's negligence by refusing to let the boat proceed from the shore,

> "for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence" (p. 401).

In the instant case even if, as the majority decision of the Circuit Court of Appeals for the Second Circuit held, notice was given to libellant by the presence of a piece of rope across the top of the steps leading to the platform around the pool that libellant was not to go into the pool, the notice thus given, "by implication," as the Presiding Judge described it, certainly had no greater effect than the direct warning given orally by the officer to the passengers in the *Weisshaar* case. Nor should the implied notice thus given by the presence of the rope have barred libellant from any recovery in the instant case when respondents' attendant Jensen and their master-at-arms Gisbart admittedly saw petitioner obviously intending to enter the pool, and though they knew this was dangerous, made no effort to warn libellant of the dangers of which he was unaware, and made no attempt in any way "to avoid the consequences" of libellant's negligence in passing the rope.

In *The Steam Dredge No. 1,* 134 Fed. 161, libellant was injured by the breaking of a bitt on which he was sitting and around which a line ran. The bitt broke as the result of excessive strain put upon it by the negligent operation of the winch. The lower court granted libellant a recovery in full, although conceding that libellant occupied a dangerous position when he sat on the bitt with the line running around it. The negligence of libellant in placing himself in this dangerous position, the lower court held, was not the proximate cause of his injuries since the operator of

the winch saw the dangerous position of libellant and could have avoided causing him any injuries in spite of his dangerous position, if the winch had been operated properly. The Circuit Court of Appeals for the First Circuit, however, held that libellant's negligence in placing himself in his position of danger contributed in bringing about his injuries and accordingly divided the damages. It affirmed the holding of the District Court that the mere fact that libellant had negligently placed himself in a position of danger did not defeat his right of recovery.

In *The Arabic,* 50 Fed. (2nd) 96 a number of passengers had placed themselves in positions of danger in steamer chairs on the deck of a vessel while she was rolling and pitching in a hurricane. Although it was claimed that warning had been given to some of these passengers, the Circuit Court of Appeals for the Second Circuit held (p. 99) that not only should warning have been given to the passengers that they occupied positions of danger but that it should have been given in such a manner as to bring home to them an appreciation of their danger.

The principle that a passenger who negligently places himself in a position of danger does not thereby discharge the carrier from its duty of exercising the highest degree of care in looking out for the safety of that passenger has been uniformly applied by the state courts:

Augusta Railway & Electric Co. v. *Smith,* 121 Georgia 29;

St. Louis, I. M. & S. Railway Co. v. *Loyd,* 109 Ark. 579, 583;

Willmott v. *The Corrigan Consol. St. Ry. Co.,* 106 Mo. 535, 542, 543;

Gage v. *St. Louis Transit Co.,* 211 Mo. 139;

Birmingham Railway Light & Power Co. v. *Bynum,* 139 Ala. 389;

Carrico v. *West Virginia Cent. & P. Ry. Co.*, 39 W. Va. 86, 99-101;
So. Covington, etc., Ry. v. *McCleave*, 18 Kentucky Law Rep. 1037.

In *Birmingham Railway Light & Power Co.* v. *Bynum*, 139 Alabama 389, the court said at page 395:

> "A passenger does not lose his character as such, and the care the company owes him, to transport him safely, by negligently assuming a dangerous position on the train."

In direct conflict with the principle applied in the foregoing decisions, the majority of the Circuit Court of Appeals in the instant case held that, since the rope must be assumed to have been in position at the top of the steps because of libellant's failure to overcome respondent's evidence that it was in position, the presence of the rope notified the libellant that he was forbidden to enter the pool. "Such information," the majority said, "however conveyed to him fulfilled respondents' duty to this libellant" (p. 905); and the presence of the rope having "withdrawn any general invitation to passengers to use the pool" the respondents "were under no duty to warn him of the dangers he would probably encounter in using it" (906). Since the use of the pool was thus forbidden entirely by the rope this "did away with any duty on the part of the respondents to advise him of specific risks he would encounter by going into the pool" (p. 906).

In other words the majority of the Circuit Court of Appeals held the mere presence of a rope assumed to have been across the top of the steps indicated by implication that libellant was forbidden to go into the pool and that that was all and everything in the nature of a warning or notice of the danger which respondent carriers were required to give libellant passenger to discharge

the legal duty of exercising the "highest" degree of care, the "utmost caution" and "extraordinary vigilance." We submit that it is obvious that a warning thus given by implication only was at most nothing more than a warning not to go into the pool and that it could not and would not give libellant any information as to the nature, character or extent of the risk that he would incur in entering the pool. As the District Court said in a finding undisturbed on appeal:

> "Libellant was a landsman and not a sailor, and was unaware of the inherent danger of going into this pool with 3½ to 5 feet of water, and under the conditions existing at the time. The danger was not too apparent to him * * * while he may not have known the degree of danger in entering the pool in the condition in which it was, nevertheless, he must have known it was somewhat dangerous" (Finding 54, p. 874).

There can be no question or doubt as to the conditions existing and here referred to which, combined with the partially filled pool, made it inherently dangerous at the time, namely the agitation of the water in the pool due to the rough seas and the rolling and pitching of this vessel, known to her officers to be noted for pitching.

Something more was required as a matter of law, we submit, than the mere placing of a rope across the steps to discharge the respondent carriers' duty of highest care, utmost caution and extraordinary vigilance to safeguard the libellant passenger; and libellant's admission that he would not go past such a rope, if it was in position, would not reduce or release the respondents from that duty of care. If the rope was in position, as the appellate court assumed, obviously it could not have had the effect of barring access to the pool or stopping the libellant from passing it because he did in fact pass it. It was not,

therefore, and could not have been the complete, effective warning required of respondents.

The insufficiency of the warning to the libellant given by the presence of the rope, assuming it was in position, was recognized by the Presiding Judge of the Circuit Court of Appeals, who disagreed with the majority that the mere presence of the rope would give libellant all warning he was entitled to receive:

> "A man may take some chances without taking other chances of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he went where passengers should not go; not with forseeing that, when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger" (p. 908).

The Chief Officer testified that this ship was "subject to pitching," and "in fact" was "noted for it" (fol. 1898). This was of course unknown to libellant, and undoubtedly was what Presiding Judge HAND referred to when he said that libellant could not be charged with foreseeing that "when the ship pitched, the swash of the water would have such force as it did" (p. 908). It has repeatedly been held that steamship passengers are neither required nor expected to anticipate the result of known and observed rolling or pitching of a vessel or the action of seas on a vessel.

Boston v. *Yarmouth S. S. Co.* v. *Frances,* 1 C. C. A., 249 Fed. 450;
The Korea Maru, 9 C. C. A., 254 Fed. 397;
The Arabic, 2 C. C. A., 50 Fed. (2) 96.

The Circuit Court of Appeals for the Second Circuit held in the *Arabic,* 50 F. (2d) 96 that when passengers

placed themselves in positions on deck which were dangerous because the ship was pitching and rolling in a hurricane, not only were the passengers entitled to warning of the danger in their positions, but that the warning must be brought home to the passengers in such a way as to make them appreciate the full extent of their danger. In that case one of the passengers, Miss McCague, had been warned by a deck steward not to sit at the forward end of the A deck. She sat in a chair at the after end of that deck. She testified she was not warned of any danger at the after end of the deck. The court said, that "several witnesses for the ship testified to giving" such warnings "but they could scarcely have been given in such a manner as to bring home to these inexperienced travellers an appreciation of their danger" (p. 99).

The failure of respondents to give libellant full warning of the extent and character of the danger which he was incurring by passing the rope, if it was in position, cannot be excused by any claim that they did not know that libellant had passed this rope and thus exposed himself to the danger which subsequently caused his injury. As Presiding Judge HAND said, when the steward Jensen, stationed at the pool, failed to warn libellant not to go into the pool it "was a failure in that extreme care which the law exacts of a carrier of passengers. The ship, having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908).

The testimony is undisputed that Jensen saw every movement made by libellant as he was about to enter the pool, and had full opportunity to warn him not to do so. Jensen testified that he was standing up on the platform around the pool on the starboard side about halfway between the forward and after end of the pool on the side which libellant used (fols. 1548-9); and that he was not more than 8 or 9 feet from the libellant at the time (fol.

1550). He testified also that he saw libellant proceed down toward the after end of the pool, saw him go up the steps to the platform around the pool (fol. 1539), saw him cross the platform and go down 5 or 6 rungs of the ladder leading to the pool (fols. 1539-40) and put his foot into the water to try it before going in (fol. 1642).

Libellant and other passengers on the ship gave similar testimony showing just what libellant did as he slowly proceeded toward and into the pool (DeVita, fols. 179-182; Erdman, fols. 440-441, 447-452, 458; Michael, fols. 798-812, 819). Not only were these facts established by uncontradicted testimony, but they were incorporated in the District Court's findings, undisturbed on appeal (Findings Nos. 14, 15, 23 to 30, 44 to 48, pp. 869 to 873), of which we quote three:

> "44. When libellant entered the pool, the attendant Jensen was about 8 or 10 feet away from libellant.
>
> 45. Although it was apparent that libellant was about to enter the pool, Jensen remained mute and said nothing whatever to libellant.
>
> 46. Jensen made no effort to warn libellant against going into the pool, nor did he warn libellant in any way as to any danger which might be encountered in going into the pool" (p. 873).

That Jensen realized it was dangerous for libellant to go into the pool and that he knew libellant should be warned against doing so is evidenced by Jensen's testimony that he actually did warn libellant not to go into the pool; first, when he heard some children talking to libellant about going into the pool (fols. 1532-33) and again when he saw libellant go up the steps leading to the platform around the pool (fol. 1539). The District Court expressly rejected Jensen's testimony that he gave these

warnings (Finding 48, p. 873), and specifically found that Jensen did not give any warning whatever to libellant and also found that it was apparent that the libellant was about to go into the pool (Findings 44, 45, 46, 47, 48, p. 873).

The majority of the judges of the Circuit Court of Appeals evidently considered this clear, undisputed testimony merely to determine whether the doctrine of "last clear chance" was applicable. Since they had concluded that respondents owed libellant no further contractual obligation as a passenger after he had passed the rope, their consideration of the undisputed testimony that Jensen saw libellant in his position of danger and did nothing about it was weighed not in the light of a duty still resting upon respondent carriers to a passenger, but merely as a general obligation such as respondents would owe to any stranger, namely, the duty of not causing injury to such a stranger when he has placed himself in a position of danger if they had the last clear chance of doing so.

Even in its consideration of whether the doctrine of last clear chance was applicable, the majority of the judges of the Circuit Court of Appeals seem to have been influenced to their decision by the fact that the District Court failed to make any finding that this doctrine was applicable. Since the District Court had already held that libellant was guilty of contributory negligence, it could not properly have made any finding that the doctrine was applicable in the present case, because this doctrine has no application where the injured party has been held guilty of contributory negligence. 11 Corpus Juris 283; *Robins* v. *Pennsylvania Co.*, 245 Fed. 435, 441 (C. C. A. 6); *Holmes* v. *Southern Pacific R. Co.*, 97 Cal. 161, 169.

Respondents' duty to libellant to notify him of the danger which he was incurring after he had passed the rope was not, under the decisions which we have cited hereinabove, the general duty owed by one stranger to

another not to injure him if there is a last clear chance to avoid doing so, but was the continuing, contractual obligation of the respondents, as carriers, to the libellant as a passenger to exercise the highest possible degree of care in looking out for his safety. The error of the majority of the judges of the Circuit Court of Appeals lies in its holding that the duty of respondents, as carriers, ended when libellant passed the rope and placed himself in a position of danger, a holding in direct conflict with the decisions hereinabove set forth.

Conclusion.

Because the decision of the majority of the judges of the Circuit Court of Appeals is in direct conflict with the decision of this court and with the decisions of the Circuit Courts of Appeal for the Ninth and First Circuits; because the decision is on an important principle of maritime law of wide application affecting every contract for the carriage of passengers by sea; and because the necessity for uniformity among the circuits in the admiralty law, as administered by them, has been repeatedly recognized by this court, we respectfully submit that a writ of certiorari should be granted in order that the question presented herein may be definitely and finally decided.

Respectfully submitted,

WARNER PYNE,
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Proctors for Libellant-Petitioner.

No. 450

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Supreme Court of the United States

OCTOBER TERM 1944.

BERT ERDMAN,
Libelant-Petitioner,

against

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

A passenger injured himself by going into a swimming pool which he knew was closed and which he knew was dangerous (874)*. The District Court held that both the carrier and the passenger were at fault and divided the damages. The Circuit Court of Appeals found that the carrier was not negligent and dismissed the libel.

The question which the libelant says is presented by the decision below does not in fact exist and there is no ground for a grant of certiorari.

* References are to the pages in the record.

The Facts.

Libelant, an adult fifty years old, was a passenger on a trip from New York to the west coast by way of Havana and the Canal. While the vessel was at sea, he entered a swimming pool which was not yet ready for use by passengers and which was not open to them and which was being filled. It was one hour after his accident before the pool was finally filled and ready for use. At that time, it was opened for use of passengers and was used with safety (657).

The libelant had been in the pool the day before. On the day of his accident and about an hour before it occurred, he had been out near the pool and had seen that its filling had commenced (854). A half hour later he again went out to the pool in a bathing suit. At that time, the pool was about half full (853). He and other passengers remained on the deck around the pool, most of them in bathing suits (733). During this time, libelant had opportunity to and did observe conditions around the pool (874). The vessel was pitching and rolling and the wind was coming over the port bow. This caused the water in the pool to swash back and forward, so that at times part of the bottom of the pool was visible (736, 415). The waves in the pool were three feet high and were being thrown a distance of four feet into the air so that they went over the top of the pool and on to the deck (854, 855).

At each side of the pool, near the rear of it, there were entrance steps which led up to a raised platform approximately 22 inches high which completely surrounded the pool (627, 628). Across these entrance steps was a removable rope which was taken down when the pool was in use but was intended to be up when the pool was not in

use (868, 635). There were other ropes permanently around the pool so that when the guard rope was up over the entrance steps, the pool was entirely closed off by a rope (868).

Although there were other passengers, including children, in bathing suits, in the immediate vicinity of the pool, no passenger, except the libelant attempted to enter the pool until it was filled one hour after the accident (517, 518, 733, 874).

Three of the other passengers testified that they knew the pool was not open for use by them (405, 746, 804, 809).

There was a dispute in the evidence as to whether the guard rope was in place across the entrance steps at the time libelant entered the pool. The respondents' witnesses, among them two passengers, said that they saw the libelant "duck under" the guard rope which they saw in position (414, 513, 810) and which was seen in position by six of the ship's personnel who, at the time they gave their testimony, were disinterested (501, 580, 607, 613, 638, 764). After going under this rope, the libelant descended the pool ladder and took a flat dive into the pool. The swashing of the water washed him against the side of the pool, causing his injuries (871).

One of the libelant's witnesses, a passenger (728), and two of the passenger witnesses for the respondents (415, 815), said that libelant sought to time his dive so that he would enter the pool at a time when most of the water was at his end, but that he evidently mistimed his entry because there was very little water at the point where he entered. None of the courts made a finding either way on this particular action of the libelant although his actions showed a lively appreciation of the sporting chance he was taking with the dangers of the pool.

Other evidence which the respondent-carrier produced indicated that the libelant's injuries were sustained by his striking the bottom when he dove into the shallow water (415, 845, 815). This was supported by evidence the libelant himself gave, that, when he dove, his hands were at his side so that he led with his head (871). This type of dive is what is known as a sailor's dive and there is a tendency of the feet to overtake the head. However, the District Court did not accept the evidence of the respondents on this point but found that, although libelant had taken a shallow dive into the pool, he was not injured at that time but an instant later when he was washed against the side of the pool (871).

During the time that libelant was around the pool and at the time he entered, there was a steward around the pool who was in reality merely a waiter. His job was to attend to the wants of the passengers around the pool and he frequently was required to leave the pool to fetch sandwiches, beverages, deck chairs, mats and other articles for the personal comfort of the passengers (498, 524, 528).

At no time throughout the case was there any dispute as to the duties of this steward, whose name was Jensen. It was the libelant's theory, and all the evidence in the case supported it, that the steward, Jensen, had absolutely no duties whatever with respect to notifying or warning passengers concerning whether the pool was open or closed or whether they were permitted to go in (872)

Furthermore, there was no evidence on the part of the libelant that he had any other understanding of the position and duties of the steward, Jensen.

There was evidence in the case that Jensen had joined two of the passengers in advising Erdman not to enter the pool because it was obviously closed and because it

was obviously dangerous (809). This warning by Jensen was offered on the question of contributory negligence and assumption of risk, and from the inception of the case there has never been any suggestion by either libelant or respondents that Jensen, in giving the warning, was performing any duty for the respondent-carrier.

The District Court found that Jensen had not given the warning but noted that two passengers had testified that they had warned the libelant (859). At the same time, the court found that Jensen had no duty to give the warning in question (872). The reason for this finding was that all of the evidence supported it, there was no evidence to the contrary, and the libelant requested such a finding specifically (872).

It was also at the request of the libelant that the District Court made conclusions of law to the same effect (876-877).

In the assignments of error presented to the Circuit Court of Appeals, the libelant did not complain that the District Court had erred in making such finding of fact and conclusions of law (892-897).

Notwithstanding that the libelant thus produced the finding in the District Court that Jensen had no duty to give him any warning whatever, the libelant now asks this court to hold that the District Court erred in finding as it did. Thus, the question now raised in this court is not presented by the record. The evidence is to the contrary. The findings and conclusions are to the contrary. And the libelant himself was responsible for this result. As will appear later herein, the Circuit Court of Appeals took the same view.

The libelant, in his brief in the Circuit Court of Appeals, for the first time made some reference to the doctrine of

last clear chance. The Circuit Court of Appeals in its opinion said:

> "There was some slight evidence that the respondents did have a last clear chance to prevent his going into the water after he had started down the ladder into the pool, but it was not enough to support any finding to that effect and none was made" (907).

This reference in the opinion of the court was not to Jensen, the steward. It referred to the fact that a master-at-arms, Gisbart, while on his way to the pool, glanced through a window, two decks above the pool, and saw the libelant just before he was ready to dive into the pool. Gisbart proceeded immediately to the pool, two decks below, but, when he got there, the accident had already occurred (579, 580). There is no evidence in the case sufficient to support a finding that Gisbart could have taken any action which would have been effective to save the libelant from his folly. The libelant did not ask the District Court to make any finding with respect to Gisbart nor did he complain in his assignments to the Circuit Court of Appeals that the District Court had failed to make such findings.

It is significant that the majority of the Circuit Court of Appeals made no reference whatever to the steward, Jensen. This was obviously because the libelant's case was premised on the evidence that Jensen was not the carrier's servant for the purpose of warning passengers concerning their entering the pool.

The dissenting judge does not mention the master-at-arms, Gisbart, but does mention the steward, Jensen. The dissent is based upon a conclusion that, as a matter of law, the carrier may not have any servant, however menial, in contact with passengers for any purpose, without charging the servant with the additional duty of warn-

ing "notoriously wayward and lawless" passengers, who "do not obey instructions," against trespassing in forbidden parts of the vessel (907).

The Decision of The District Court (850-878.)

When the trial was nearly over, the District Court indicated that it recognized the crucial importance of the question of whether the guard rope was in position across the entrance steps of the pool. It stated to the libelant with respect to the absence of this rope as follows:

> "The Court: That is your main case. If you do not prove that, you are out of luck, that is all" (695).

However, the District Court was not able to reach any conclusion concerning the presence or absence of the rope and decided the case on the premise that the question was unimportant. It then made a number of findings concerning the negligence of the carrier, everyone of which was unjustified if the guard rope was in fact present across the entrance steps to the pool.

The reason the District Court made the findings referred to, was that it was unable to reach a conclusion concerning the presence or absence of the rope across the steps. For instance, the District Court found that there was no sign of warning to passengers not to use the pool but on the contrary there was a continuous invitation to passengers to use it. However, this could not be true if the rope was in position across the entrance steps, because in that event there was no invitation to use the pool and the libelant himself admitted that such a rope was sufficient warning to keep him out of the pool (690).

Again, the District Court found there were no regulations posted, informing passengers when and under what

conditions the pool might be used. However, here again the means adopted by the carrier and carried out by its officers and seamen, viz.: the short guard rope over the entrance steps of the pool, was sufficient to inform passengers that the pool was not to be used and was so regarded by Erdman (690) and other passengers (408, 804).

Moreover, the respondents' evidence showed that this same method had been in use on this ship and sister ships with similar pools, for two years and had satisfactorily served the purpose of keeping passengers out of the pool (658, 659).

Again, the District Court found that neither the master nor any other officer of the ship issued any orders to any of the ship's personnel that passengers were to be kept out of the pool. But the master-at-arms had performed his routine duty of putting the guard rope in position across the entrance steps (564, 566, 575) and the officers on the bridge had looked down and seen that it was in position (761, 762), and on Erdman's own admission at the trial, this was a sufficient barrier to keep him out of the pool (690).

The District Court also found that the libelant himself was guilty of negligence because he knew the vessel was rolling and pitching and saw the agitated condition of the water in the pool and the water from the pool splashing over the deck and that none of the other prospective bathers entered the pool. These conditions gave him notice that it was somewhat dangerous to enter (874).

The respondents appealed to the Circuit Court of Appeals on two grounds. The first was that the libel should have been dismissed because the findings of the District Court concerning the conduct and knowledge of the libelant were tantamount to a finding of assumption of risk by him

and not merely contributory negligence. In fact, the negligence which the court found him guilty of consisted of his entering a pool which was not yet filled, when he knew it was "somewhat dangerous" to do so (874).

A second ground for the respondents' appeal was that the libel should have been dismissed because of the failure of the libelant to prove that the guard rope across the entrance steps was not in position.

THE DECISION OF THE CIRCUIT COURT OF APPEALS (903-908).

The majority of the court held that when the carrier introduced evidence of the presence of the guard rope over the entrance steps, the burden of proof was on the libelant to satisfy the trial court, by a fair preponderance of the evidence, that this rope was not in place. This was so because of his admission that the rope was all he needed as a warning not to pass it. The court said:

> "He then testified that no rope was up, and added, 'I would not stoop, bend or get under any rope under any consideration to get into the pool'. This answer shows beyond question that the rope when in place was all that he needed as a warning not to go past it and into the pool" (905).

The court held that adult passengers need not be treated by the carrier as though they were wholly lacking in intelligence and common sense and that the libelant, having knowledge that the pool was not open to him, could not require the carrier to give him an additional warning of the specific danger which overtook him (906).

It was not necessary for the Circuit Court to pass upon the libelant's negligence, but the decision and the words

of the opinion imply that the rope barrier was a warning of danger, and that he was solely at fault.

Nor was it necessary for the majority of the Circuit Court to pass upon the carrier's contention that the passenger had assumed the risk of his injury when he entered the pool with knowledge of danger.

The dissenting judge agreed with the majority that, for purpose of establishing negligence on the part of the carrier, the libelant had the burden of proving that the guard rope was not in position across the entrance steps (907).

However, the dissenting opinion goes much further than the majority in holding that the facts of the case established beyond question that not only was there no invitation to the libelant to use the pool, but, on the contary, the circumstances indicated plainly to him that the pool was closed and that he was forbidden to use it (907-908).

The dissenting judge said that this was true even if it be assumed that the guard rope was not in place across the entrance steps.

For purposes of discussing contributory negligence, the dissenting judge assumed that the guard rope was not in position across the steps but said:

> "Nevertheless, no other passenger did try to go in, and, even though the guard rope was not in place, it was apparent that the pool was not yet ready for passengers" (908).

He referred to the pool (with the guard rope down) as "obviously not intended for passengers" and said "a pool that is being filled is not a pool meant for passengers. Anyone who uses it is charged with the knowledge that the ship

is not extending to him the usual protection'' (908). These words indicate beyond cavil that the dissenting judge found that libelant knew the pool was closed to him even if the guard rope had not been in place.

With the guard rope in place, the dissenting judge thought that it could have no other meaning but—Stay out of the pool; and—Stay out because it is dangerous (907). Yet he held that, despite the warning of danger to libelant's person which was given to him when the guard rope was in position across the entrance steps and despite the trespass which libelant knew he was committing, whether the rope was or was not in position, the libelant was nevertheless entitled to a still further oral warning from the steward who, everybody concedes, was not there for that purpose. Even here, the dissenting judge does not say that the steward should have warned him of danger. He should merely have said ''Do not enter the pool'' (908)

Having decided that the carrier must take more than one or two means of bringing home to the libelant the fact that the pool was closed, the dissenting judge was compelled to deal with the carrier's defense of assumption of risk. On this subject, the dissenting judge said that, with the rope in position, the libelant knew that the pool was not safe. He also made the following observations on the assumption that the guard rope was not in position:

> ''* * *. I think that, if a passenger uses a part of the ship which is obviously not intended for passengers, he takes some chances. * * *. Anyone who uses it, is charged with knowledge that the ship does not extend to him the usual protection.
>
> ''* * * A man may take some chances without taking other chances of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he

> went where passengers should not go; not with foreseeing that, when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger * * *'' (908).

In its brief, the carrier had cited decisions of federal and state courts to the effect that to be held guilty of assumption of risk, it was not necessary that an injured person know of every danger which might overtake him, nor of the specific one which overtook him. It was sufficient if he knew that there was some danger. The dissenting judge, without citing any case to the contrary said: ''There are no doubt expressions to that effect in the books, but it seems to me that this is plainly wrong'' (908).

Regardless of the correctness of the dissenting judge's conclusions with respect to respondent's negligence and libelant's assumption of risk, it is clear that he did not have in mind that this case involved the doctrine of last clear chance. All that he could see was a simple case of the concurrence of libelant's negligence with the supposed negligence of the respondent-carrier. Concurrent negligence is, of course, incompatible with the fundamental notion behind the doctrine of last clear chance. *Jerrell* v. *New York Central Railroad Co.*, 68 F. 2nd 856 (C. C. A. 2nd, 1934, opinion by Judge Learned Hand who wrote the dissent in the case at bar). See also cases cited in petitioner's brief, page 19.

The Question Presented.

The only question which the libelant has sought to raise in this court is one based on a supposed application of the doctrine of last clear chance. However, the record

does not present any such question. What is presented by this record is as follows:

The District Court did not make any findings with respect to last clear chance. With respect to Jensen, the steward, the uncontradicted evidence, which both sides introduced, afforded no justification in fact or in law for the application of the doctrine. With respect to the master-at-arms, Gisbart, there was no evidence that it was physically possible for him to intervene in time to stop the continuing negligent act of the libelant in proceeding, with knowledge of danger, into the pool.

The libelant did not assign error to the District Court's findings or failure to find with respect to either Jensen or Gisbart. The majority of the Circuit Court of Appeals did not disturb the findings of the District Court in any respect. Even the dissenting judge could not discover in this case anything resembling the doctrine of last clear chance.

This case, therefore, calls for the application of the rule that the Supreme Court will not interfere with findings made by two lower courts. *Just et al.* v. *Chambers, Executrix,* 312 U. S. 383, at page 385. The rule is as applicable where there is a refusal to find as where positive findings are made. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.,* 114 F. 2nd 248, affirmed 314 U. S. 104. Within the principle announced in that case, the failure of two courts to find that there was a basis for the application of the doctrine of last clear chance, is equivalent to an affirmative finding in both courts that there was not.

POINT I.

THE CARRIER MET ITS FULL DUTY TO THE LIBELANT WHEN THE CIRCUMSTANCES REVEALED TO HIM THAT THE POOL WAS CLOSED.

It is settled law, as the majority of the court found, that the duty of the carrier to the libelant was fulfilled if he knew he was not permitted to enter the pool. The question is entirely one of invitation or lack of invitation.

This precise point came to the notice of this court in *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80. In that case a passenger at a station attempted to board a moving train. The Supreme Court noticed that in all jurisdictions such a person was deprived of recovery. In some jurisdictions this was placed upon the ground that the high degree of care which a carrier owes a passenger did not attach to one who was seeking to board a moving train, because the implied invitation to board the train was withdrawn as soon as it began to move, and such a person did not attain the privileged status of passenger. In other jurisdictions, the courts regarded the injured person as a passenger whether he had boarded the vehicle or not, but, nevertheless, denied him recovery on the ground that the passenger was attempting to go to some portion of the carrier's premises to which he was not invited. Having made these remarks about decisions in other jurisdictions, the Supreme Court gave its own opinion concerning passengers who go to places on carriers' vehicles without invitation. The Supreme Court said, page 84:

> "* * *. Yet the negligence of a passenger in going into a known place of danger without the inducement or invitation of the carrier may bar

> his recovery for the resulting injury, even though the passenger-carrier relationship has begun and continues. * * *."

In *New Jersey Steamboat Co.* v. *Brockett,* 121 U. S. 637 the carrier had not allowed passengers to go to a certain portion of the deck. Plaintiff, a passenger, went to that part of the deck and the servants of the carrier, in removing him, used more force than was justified and assaulted him. The court held the carrier liable for the assault but plainly implied that had the passenger been injured while in the forbidden area in a manner otherwise than by assault, he could not have held the carrier liable. The court said, page 645:

> "* * *. If the injuries necessarily arose from his violation of the regulations established for deck passengers, the carrier would not be responsible therefor. * * *."

In the present case, both the majority and the dissenting judge in the Circuit Court of Appeals were in agreement that the libelant knew he was not invited into the pool. The majority said this was so because the guard rope was across the entrance steps and libelant had testified that he knew what that meant. The minority said so because it thought that such a rope must have meant not only that the pool was closed to the passenger but also that it was dangerous for him to go in. The minority went even further and stated that even if the rope had not been in position, the libelant must have known he was not invited to enter the pool. On this point, the language used by the dissenting judge is significant,

> "* * *, even though the guard rope was not in place, it was apparent that the pool was not yet

> ready for passengers. * * *. A pool that is being filled is not a pool meant for passengers. Anyone who uses it, is charged with knowledge that the ship does not extend to him the usual protection'' (908).

It is true that the judge was using this language in discussing the passenger's contributory negligence. However, his language establishes, that the reason for the passenger's negligence was the fact that he knew he was not invited into the pool.

The rule of non liability to passengers who go into places where they are not invited, is founded upon the premise that common carriers are entitled to assume that passengers will exercise ordinary prudence and common sense for their own safety. *In Re Keansburg Steamship Co.*, 249 Fed. 472. *The Tourist*, 265 Fed. 700. *The Empress of Scotland* 11 F 2d 783.

If it is true, as even the dissenting judge said, that the guard rope in place across the entrance steps, not only meant that passengers were to stay out of the pool but also that they were to stay out because it was dangerous, it is difficult to understand how anything further, short of force used on the plaintiff, would have prevented the accident. It must be remembered that the libelant himself admitted at the trial that a rope in place across the entrance steps was an adequate barrier which he would not pass. It is hard to see how such a person would have had more regard for the superfluous word of a menial servant whose appearance belied any suggestion of authority.

In his brief, the libelant argues that the rope could not have been enough in this case because the libelant ducked under it and went into the pool. This same argument could be used to justify any conduct of any intractable passenger who refused to obey appearances, signs or oral warnings.

According to this theory, the carrier would have the burden of so delicately adjusting his use of physical force as to avoid, on the one hand, too great a use of it, which would result in liability for an assault and, on the other, using too little, which would result in liability for negligence.

But it is well settled that the use of physical force is not necessary. This is nowhere better expressed than in *Bridges v. Jackson E.R.L. & P. Co.*, 86 Miss. 584, where the court said, page 595:

> "* * * In the case of Indianapolis R. R. v. Rutherford (Ind.), 92 Am. Dec., 336, the court held that the duty of the carrier does not extend to barricading its cars and imprisoning its passengers so as to prevent them by their recklessness and folly from voluntarily exposing themselves to needless perils or obvious dangers. Such a doctrine would give power to railway officials to so restrain the liberty of their passengers in every respect that they could not by any act of their own put themselves in unnecessary danger, for such a power must necessarily exist if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. Carriers have not, and ought not to have, any such powers, and hence no liability results. Their passengers are not their slaves. Though passengers, they are nevertheless free men. * * *."

The case of *The Arabic*, 50 F. 2d 96, relied upon by the libelant, is not to the contrary. That case is entirely different from the one at bar. There the passengers, while in their usual and ordinary places about the deck or even in their rooms, were, unbeknownst to themselves, in extreme peril to their very lives because the vessel, while in shallow waters, was about to encounter a hurricane. The passengers were in danger no matter where they stayed (short of their

beds). In such circumstances, the court held that the carrier should either have forcibly taken them to their beds or warned them that they would be seriously injured if they stayed elsewhere. The judge who wrote the opinion in that case was one of the judges who comprised the majority of the case at bar.

In the case at bar, the libelant was in a safe place but chose to enter a place which he knew was "somewhat dangerous" and which all the judges of the Circuit Court of Appeals said he knew he was forbidden to enter.

POINT II.

THE CARRIER WAS NOT RESPONSIBLE FOR THE STEWARD JENSEN'S FAILURE TO WARN.

The dissenting judge cites no authority in support of his holding, and the authorities the respondents have been able to find look the other way.

It is well settled that a master is not liable for the acts of servants which he has not charged them with the duty of performing. *Kuhn* v. *The City of New York*, 274 N. Y. 118. *Ford* v. *Grand Union Company*, 268 N. Y. 243.

A fortiori the master is not liable for the failure of a particular servant to perform an act which he has not charged him with the duty of performing.

It is undisputed in this case that Jensen was not the carrier's agent for notifying passengers with respect to the use of the swimming pool. Neither side made any contention that he had any such duties. In fact, Jensen himself said that he had none and the court so found and this finding was made at the express request of the libelant.

It seems clear that the libelant tried his case with the view of first persuading the court that Jensen had not given

him any warning, and, if he failed in this effort, he wished to be in a position of then having the court find that, even though Jensen had warned him, still Jensen was merely a steward and the warning did not bear the authority of the carrier. In other words, it would not negative the invitation which the libelant assumed existed and on which he was relying. Having succeeded in his first purpose of obtaining a finding that Jensen did not warn him, he now belatedly changes his second purpose and asks to have the carrier bound by the omission of its unauthorized servant. Not only the law but simple justice should prevent him from succeeding.

POINT III.

The libelant assumed the risk of his injury.

The District Judge held that the libelant knew that entry into the pool was "somewhat dangerous." He entered a conclusion of law that "libelant as a passenger aboard the ship assumed certain risks in using the advantages of the ship" (878).

The majority of the Circuit Court, having decided for the carrier on another ground, did not have to pass on the carrier's contention that the libelant, having knowledge of danger in entering the pool, assumed the risk of the injury which overtook him.

The minority judge in the Circuit Court of Appeals thought that the libelant assumed only the risks of "general dangers which might be present when he went where passengers should not go".

The dissenting judge did not say what these general dangers were, except to indicate that they were something different from the specific risks which overtook the libelant.

He did not cite any case for this distinction and thought that the expressions in the books to the contrary were "plainly wrong".

It is submitted here that the cases in the books are correct. They establish the rule that the doctrine of assumption of risk cannot be attenuated by an inquiry into what specific dangers the person had in mind when he entered a place where he knew there was danger of injury to his person.

In the opinions, the word "danger" and "injury" are used interchangeably. In *Louisville & N. R. Co.* v. *Kemper*, 47 N. E. 214, 147 Ind. 561, the court said, page 216:

> "* * *. There has been no effort in the decisions to place the doctrine of the assumption of risks upon the narrow distinction that one may know of danger, but, if he do not fully appreciate its extent, there is no assumption * * *."

That case was cited by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Crude-Oil Co.* v. *Grable*, 94 Fed. 73 at page 80.

In *Houston's Adm'x* v. *Seaboard Air Line Ry.*, 123 Va. 290, 96 S. E. 270, the court said, page 299:

> "The particular injury sustained need not have been apprehended nor the danger thereof fully realized, * * *."

And at page 300:

> "* * *. He need not have in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury."

The matter is simply stated in *Davis* v. *Somers-Cambridge Co.*, 79 N. E. 233 (Ohio), where the court said, page 235:

"* * *, and it does not matter that he did not know, and did not appreciate the precise extent or character of the injury he would sustain in the event of an explosion. To adopt such test would be to introduce into the doctrine of assumption of risk a wholly impracticable element and a rule of greatest uncertainty. The rule is, that one who exposes himself to an obvious and appreciated danger, even though he should not appreciate the full extent of the danger, assumes the risk of injury that may result to him therefrom. * * *."

Other decisions are as follows:

Feely v. *Pearson Cordage Co.*, 37 N. E. 368, 161 Mass. 426;

Luebben v. *Wisconsin Traction, Light, Heat & Power Co.*, 154 Wis. 378, 141 N. W. 214;

Dodge v. *Kaufman et al.*, 152 Wis. 171, 139 N. W. 741;

Hanson v. *Superior Mfg. Co.*, 136 Wis. 617, 118 N. W. 180.

LAST POINT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

VERNON SIMS JONES,
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Attorneys for Respondents.

(31)

OCT 27 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 490

BERT ERDMAN,

Libellant-Petitioner,

against

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Respondents.

REPLY BRIEF OF PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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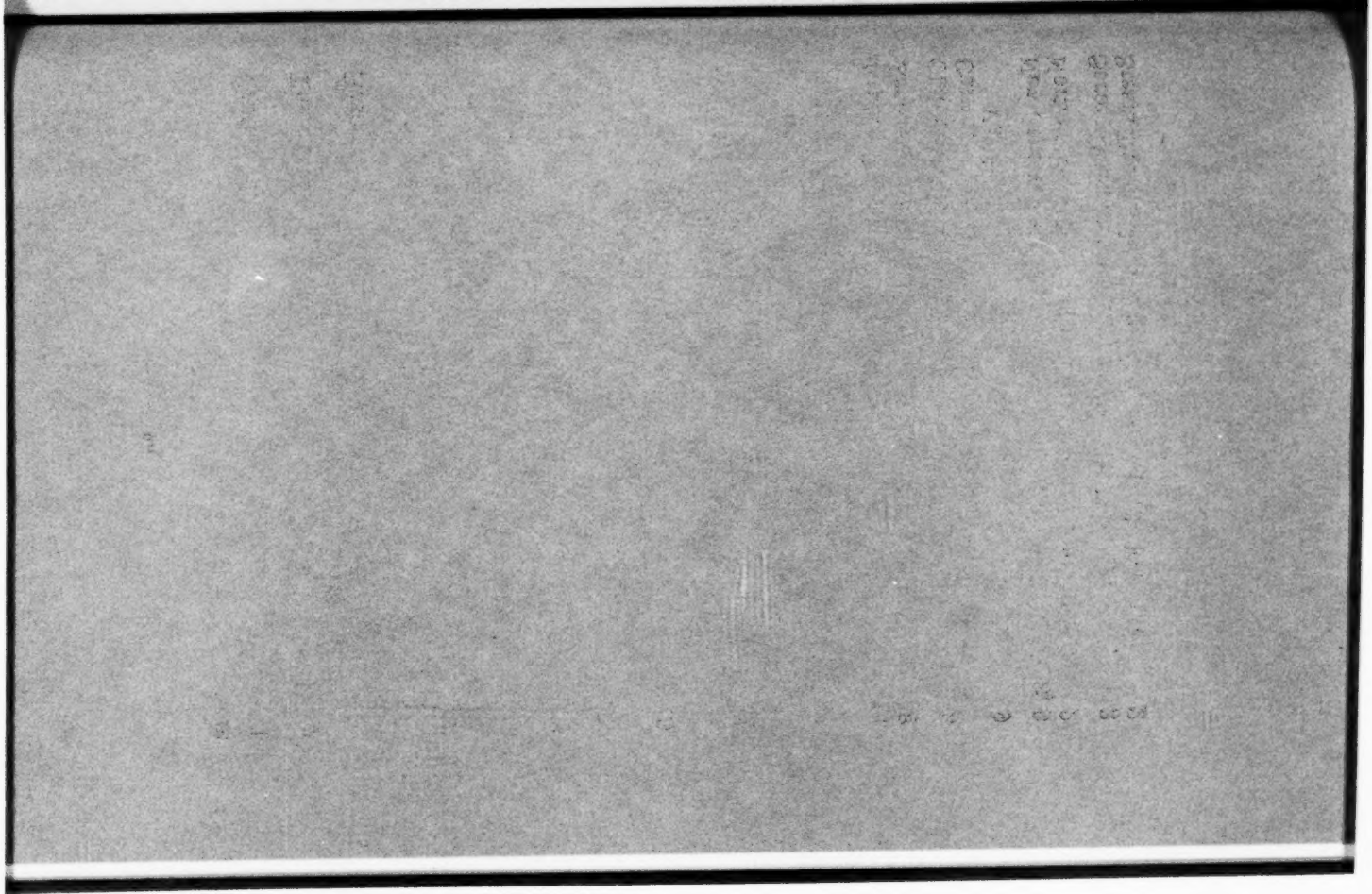

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REPLY BRIEF OF PETITIONER

Conflict of Decisions.

Respondents' brief does not deny that the principle of law laid down in the majority decision of the Circuit Court of Appeals is in square conflict with the decision of this Court in *Chunn* v. *City & Suburban Ry.*, 207 U. S. 302, and the decisions of the Circuit Courts of Appeals cited in petitioner's main brief, which hold that the duty of a carrier to exercise the highest degree of care for a passenger's safety continues after the passenger has through his own act of negligence placed himself in a position of danger, known to and observed by carrier's agents.

The Question Presented.

Respondents (brief, pp. 12, 13) state that the question presented to this court is one based on the "supposed application of the doctrine of last clear chance," and that "the libellant in his brief in the Circuit Court of Appeals for the first time made some reference to the doctrine of last clear chance." These statements are both completely in error. It was not the libellant, but the respondents only, who referred in the Circuit Court of Appeals to the doctrine of last clear chance, and they did so in their reply brief at page 12. Petitioner does not here, and did not in either lower court in brief or oral argument, expressly or inferentially refer to the doctrine of last clear chance. That doctrine has no application to, and no bearing whatever, on the question of law on which libellant-petitioner relies, i. e., the proposition of law laid down in *Chunn* v. *City and Suburban Ry.*, 207 U. S. 302, and stated in Hutchinson on Carriers (our main brief, pp. 10, 11). It is the respondents only who below and here referred to, and confused the issue with, a reference to the doctrine of last clear chance. There is no occasion or reason for attempting to invoke the doctrine of last clear chance in the instant case; and respondents' error in doing so and misconception of petitioner's contention and of the evidence is apparent when it is recalled that in admiralty, where and because contributory negligence effects only a division of liability, the doctrine of last clear chance is inapplicable. (*The Norman B. Ream,* C. C. A. 7th, 252 Fed. 409, 414; *The Steam Dredge No. 1,* C. C. A. 1st, 134 Fed. 161.)

Respondents misconceive the question presented to this court. The question does not involve or concern the doctrine of last clear chance; but whether the duty of an ocean carrier to exercise extraordinary vigilance and the high-

est care for the safety of passengers is completely discharged, as the majority of the Circuit Court of Appeals held in the instant case, by the act of the passenger in negligently placing himself in a position of danger; or whether, as libellant contends, the carrier's duty still continues after the passenger has placed himself in a position of danger, and when the carrier's agents see him in such position and have ample opportunity to warn him or take some steps to protect him. As Chief Justice HAND makes clear in his dissenting opinion, the negligence of the respondents was not failure under the last clear chance doctrine, but a "failure in that extreme care which the law exacts of a carrier of passengers" (p. 908, fol. 910).

Respondents' Statement of Facts Differs Materially From, and in Many Instances is at Variance With, the Findings of the District Court, and is Otherwise in Conflict With the Proof.

The facts stated in our petition and brief, as the citations will demonstrate, are scrupulously in accord with the findings of the lower courts. The trial judge in 63 separately numbered findings comprehensively stated the facts (pp. 866-876, fols. 2598-2628); and the facts so found were amply supported by the evidence, and were not disturbed by or attacked in the Circuit Court of Appeals. There is and can be no issue or dispute of fact involved in this appeal. Yet we reluctantly but necessarily state that examination of respondents' references will demonstrate that in many instances respondents' statements are at variance with the findings and the proof, that respondents seek to reopen fact issues settled by the findings, and present an account which in many particulars is quite unfair and unjustified. For illustration we cite four specific instances:

1. Respondents' brief (p. 3) states that three witnesses testified that libellant sought to time his dive so that he would enter the pool at a time when most of the water was at his end, and cites the Kingsberg boy at page 728, Mrs. Remsen at page 415, and Patricia Farrell at page 815. We can find no such testimony either at these pages or elsewhere in the record. Not only did the Kingsberg boy say nothing whatever about a timed dive, but he twice clearly and unequivocally testified that Erdman did not dive at all, but "sort of flopped in the water" (p. 714, fol. 2142); and that he entered the water "partly on his own accord and I guess he left partly because the boat was pitching" (p. 728, fol. 2183). Mrs. Remsen, to whom the respondent next refers in support of this assertion, testified at length as respondents' principal witness that the libellant made a deep dive and was injured by striking his head on the bottom of the pool. But she gave a statement to the ship's master, which she said she herself prepared (p. 425, fol. 1274), in which she said that "the dive was a flat one that swimmers often use when going off float steps rather casually" (p. 845, fol. 2535). The District Judge expressly rejected her testimony as to a deep 45° dive, and that libellant was injured by striking his head on the bottom of the pool; and found that the libellant did not dive into the water in any such manner; that libellant was not injured by striking the bottom of the pool, as respondents contended, but was injured when he was thrown against the side of the pool (Findings 28 to 32, p. 871, fols. 2612-2613). Even if the alleged "timed dive" could fairly be spelled out of Mrs. Remen's testimony (and we submit it cannot be), we are unable to understand why respondents insist on referring to any testimony of a witness so repudiated by the court's findings, or why respondents still persist, as they do at page 4 of their brief in this court, in referring to expressly rejected evi-

dence that libellant's injuries were received by striking the bottom of the pool in a deep dive. Patricia Farrell, the third and last witness to whom respondents refer, citing page 815, in support of the assertion of a "timed dive," gave no testimony that there was any such dive.

2. Respondents' brief (p. 2) states that at the time the libellant entered the pool the water in it was swashing back and forth so that at times the bottom of the pool was visible, and that waves three feet high were being thrown a distance of four feet into the air so that they went over the top and onto the deck. This is a grossly exaggerated statement of the conditions, and is unsupported by respondents' citations. The testimony of the witness Kingsberg, cited by respondents at page 736, makes no statement such as respondents claim. On the contrary this boy, who was 11 years old at the time of the accident (p. 712, fol. 2136), testified that the water did not splash so as to uncover or expose the bottom of the pool (p. 735, fol. 2205). The District Judge referred to testimony that spray from the waves came onto the deck, and that the wind would sometimes whip the top of the water so as to make waves which one of the witnesses testified from bottom to top were 2 to 2½ feet and sometimes 3 feet high (Opinion, p. 855, fol. 2563). Obviously with 3½ to 5 feet of water in the pool (Finding 16, p. 869, fol. 2607) and the pool 9 feet 5 inches deep (p. 867, fol. 2601) waves of such height could not and did not roll onto the deck; but rather only spray, whipped by the wind. None of the witnesses testified and certainly the District Judge did not find that any waves "went over the top of the pool and on to the deck." The District Judge's finding as to condition of the water in the pool was merely that the water was in an agitated condition (Finding 18, p. 870, fol. 2608), and that "sprays were breaking out over the pool because the water was slapping

against the sides, and there were waves over the surface of the water" (Finding 26, p. 870, fol. 2610).

Respondents' reference to Mrs. Remsen's testimony (p. 415, fol. 1245) that the waves "made the bottom of the pool plainly visible" does not support respondents' assertions; for respondents' own proof was that the bottom of this pool would be visible when the water had full depth, and common knowledge makes that obvious. Respondents' witness Patricia Farrell testified that the bottom of this pool "was painted bright blue" and that "even when there was ten feet of water in it it looked like there was about three" (p. 813, fol. 2437). The findings and opinion leave no doubt that the bottom of the pool was nowhere and never exposed, and that the waves in the pool did not and could not break over the deck, but only spray.

3. Respondents' brief (p. 3) states that three passengers testified that they knew the pool was not open for use by them; but both respondents' references and other testimony show that (a) two of these passengers referred to a time an hour prior to the time the libellant entered the pool, and to a time when the pool was empty, or practically empty, and filling of the pool had just started; and (b) the third passenger gave no testimony such as respondents allege. Mrs. Remsen (p. 405, fol. 1215) stated that about an hour after lunch she looked at the pool and realized it was closed. It was not until 3:05 p. m. that filling of the pool was started (p. 508, fol. 1523); so that the pool was empty when Mrs. Remsen looked at it and realized it was closed. The second witness to whom respondents refer is Patricia Farrell, a girl thirteen years of age at the time of the accident (p. 801, fol. 2401). The testimony is clear that at 3:05 p. m. when filling of the pool started this child and other children were expressly told by the steward Jensen that the pool was not open. Jensen testified

that at 3:05 p. m., when filling started, the bridge officer called down to keep the children away, and that he, Jensen, then warned the children, and "held onto the little girl," "little Patsy" (p. 508, fols. 1523, 1524; pp. 511-512, fols. 1533, 1534; p. 513, fol. 1538). When the libellant entered the pool at 4:00 p. m., it had 3½ to 5 feet of water in it (Finding 16, 55; p. 869, fol. 2607; p. 874, fol. 2621). This same child testified that she thought at that time that it would be all right for libellant to go in, did not think he would be hurt, and "didn't think it was dangerous" (p. 821, fol. 2463). The testimony of the third witness referred to by respondents, Mr. Chenery, is devoid of anything to support respondents' assertion that he said he knew the pool was closed; and certainly he did not so testify. All he said was that he did not go into the pool because there was "some restraining influence" the nature of which he could not recall, "I can't tell you the specific reason" (p. 746, fol. 2238; p. 752, fols. 2254-5). Inasmuch as two other witnesses were restrained by cold weather, it is at least equally fair to infer that it was the cold that restrained Mr. Chenery; indeed such inference seems more fair, in view of certain findings, and the entire testimony. The passengers Michael and Hinkle did not go in because it was too cold. Michael, in his bathing trunks, sat on the edge of the pool, watching Erdman as the latter entered, and intending to follow in, if Erdman did not report the water too cold (Hinkle, p. 248, fol. 743; Michael, p. 267, fol. 801, p. 268, fol. 802, p. 269, fol. 806; Finding No. 24, p. 870, fol. 2610).

4. The statement appearing on the first page of respondents' brief that libellant knew that the pool "was closed" is unsupported by any testimony, and no such finding was made by the District Court. On the contrary the court found that "with no sign or warning of any kind,

and the pool at least partially filled with water, there was continuous invitation to passengers to use the pool, as one of the advantages of the ship" (Finding 43, p. 873, fol. 2617); and that libellant in using the pool under existing conditions "was an invitee and not a trespasser" (Conclusion 5, p. 877, fol. 2630).

Respondents' brief (p. 5) asserts that libellant requested specific findings by the District Court that Jensen was under no duty of giving any warning to libellant. That is incorrect. The trial judge stated in his opinion that Jensen had no such duty (p. 858, fol. 2573) as a reason among others for rejecting Jensen's testimony, and for holding the ship's master and officers negligent for failing properly to instruct Jensen. Proposed findings and conclusions were submitted by libellant which strictly followed the opinion (pp. 850-865), to comply with the express suggestion of the District Judge (p. 865, fols. 2594-2595), and these findings, with additional ones proposed by respondents, were adopted.

I.

Respondents' duty to libellant did not end when he passed the rope and placed himself in a position of danger.

In support of their contention that respondents as carriers discharged their full duty to the libellant when they notified him by implication through the assumed presence of the rope that he was not entitled to go into the pool, respondents cite *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, and *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 637.

The *Aschenbrenner* case involved only the question as to whether a person injured while he was attempting to

board a moving train had become a passenger within the meaning of an insurance policy. Further there was no evidence that the carrier's agents saw the passenger as he was attempting to board the train, or that they had any opportunity to warn him of the danger of doing so; in marked contrast to the cases cited in our main brief (pp. 14, 15) such as *Currico* v. *West Virginia Central Railway Co.*, 39 W. Va. 86, in which the appellate court approved an instruction of the trial court that the negligence of a train passenger in permitting his arm to extend out of the window of a car did not excuse or relieve the carrier from liability when the carrier's employee had seen the projecting arm, but had not acted quickly enough in warning the passenger of the danger.

In *New Jersey Steamboat Co.* v. *Brockett* a steamship passenger was injured in a scuffle with a member of the crew who attempted to eject the passenger from a place which ticket provisions and signs forbade him to enter. Not only was there no evidence that the carrier's agents saw the passenger when he entered the forbidden part of the ship, but it is clear that when they did discover the passenger's presence there, they not only notified him, but took affirmative action to cause him to leave. The vitally distinguishing feature of the instant case is that, although it was obvious and known to the ship's officers and some of the crew that libellant was in the act of putting himself in a position of danger, they made no effort to warn him, despite opportunity to do so.

Respondents contend (brief, p. 16) that when libellant had passed the rope which is assumed to have been in position, there was nothing further they could do to keep libellant from entering the pool except to use physical force. Libellant did not and does not now contend that physical force should be used. Libellant contends that after respondents' agents saw the libellant pass the rope

and saw that he was about to put himself in a position of danger, it was respondents' duty, not physically to prevent him from entering the pool, but to warn him of the dangers of doing so. The very fact that the libellant was about to enter the pool made, or should have made, it obvious to respondents' employees that libellant did not appreciate the full nature or extent of the danger; and as we later herein point out, there were special risks, inherent dangers as the trial judge called them, of entering this pool on this ship, of which dangers the libellant was unaware (Finding 54, p. 874, fols. 2620-1).

II.

Respondents were responsible for the failure not only of the steward Jensen but of others of the ship's personnel to warn libellant.

Respondents (brief, Point II, pp. 18, 19) seek to escape liability for the failure of the steward Jensen to give any warning to libellant not to go into the pool, on the ground that Jensen's failure in that connection was not the act of his employer because he had been given no instructions to warn, and had no duty to do so.

Jensen was the only member of the crew who respondents claim gave any warning, and the length to which respondents went at the trial to prove an express warning by Jensen to the libellant (pp. 508 to 513) in support of the pleaded defense that libellant was "advised and warned not to enter the pool" (Ans., p. 16, fol. 48); the orders from the bridge officers to Jensen at 3:05 p. m. to keep the children away from the pool (p. 508, fol. 1523); the very presence of Jensen at the pool, as the only ship's attendant there; the trip Jensen made to the bridge while the pool was being filled to ask that it be drained because the water

was splashing people on deck (p. 842, fol. 2525); his testimony early in his direct examination that "it was my duty to come out and see if they were filling up the pool" (p. 498, fol. 1494) all indicate that warning passengers was within the scope of his authority and duties. The trial judge expressly rejected Jensen's testimony as to a warning (Findings 45, 46, 48, p. 873, fols. 2618-9). That Jensen had no express instructions to warn passengers (Findings 39, 41, p. 872, fol. 2616) was a factor in disproving his testimony that he did in fact warn libellant; and was also proof of negligence of respondents in failing properly to instruct Jensen, and proof of the negligence of ship's master and other officers to issue any orders to keep passengers out of the pool, or to see that they were kept out, or to "adopt any system of looking after the safety of passengers in regard to the pool" (Finding 35, p. 872, fol. 2615; Findings 49 to 53, pp. 873-4, fols. 2619-2620).

That Jensen had not been given instructions to warn, or that it was not part of his duty to do so, does not discharge respondents from liability because, as Chief Justice HAND said in his dissenting opinion, "The ship, having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908, fol. 910).

The contention that Jensen was not authorized to warn libellant cannot be urged as an excuse in connection with the failure of the master-at-arms, Gisbart, to give such warning. He testified that his duties were to see "to the safety of the ship and the passengers" (p. 584, fol. 1752).

Appreciating it was unquestionably part of Gisbart's duties to warn passengers not to enter the pool, respondents (brief, p. 13) say that "there was no evidence that it was physically possible for him to intervene in time" to stop libellant from going into the pool. This statement is in conflict with his testimony that he saw libellant standing on the steps of the ladder leading down into the pool and

obviously intending to go into the pool (p. 599, fols. 1796, 1797). Gisbart was then standing at the forward part of the promenade deck, directly above and overlooking the pool, alongside a door at the head of an outside stairway which led directly down to the deck below, alongside the pool (p. 600, fol. 1800). All Gisbart had to do was to open this door and call to the libellant not to go into the pool; but instead of so doing he proceeded, admittedly in no hurry and taking the longer way down, by another stairway some distance in the rear inside the ship, to make his way down to the pool (pp. 600-1, fols. 1800-1) to "chase him (Erdman) out of the pool" (p. 580, fol. 1740). Admittedly he gave libellant no warning.

Not only, however, did both Jensen and Gisbart see libellant as he was about to enter the pool and have opportunity to warn him not to do so, but the ship's officers also saw or should have seen libellant about to enter the pool and should have given him some warning. Alexanderson, a licensed master, was the officer on watch on the bridge (p. 754, fol. 2261), assisted by the junior third officer, two quartermasters, and a lookout (p. 757, fol. 2269). He testified those on watch on the bridge "could see the pool very distinctly" (p. 758, fol. 2274); that he looked at it continually (p. 761, fol. 2283); and that he "was looking at it all the time" (p. 779, fol. 2336). At 3:05 P. M. one of these bridge officers called to the steward, Jensen, to keep the children away from the pool (p. 508, fol. 1523); yet no such warning was given to, or attempted to be given to, Erdman. The duty resting upon the carrier to warn a passenger who has placed himself in a position of danger applies not only in situations in which the carrier's agents actually see, but also in which they should see the passenger in the dangerous position (Hutchinson on Carriers, 3rd Ed., Vol. 3, Sec. 1173, p. 1368).

III.

Libellant did not assume the risks which caused his injuries.

Respondents contend not only that libellant assumed the risk of his injury when he passed the rope and entered the pool, but assumed every possible risk, and cite cases (brief, pp. 20, 21) which are all actions at law between master and servant in which the defective conditions existed for a considerable time and were as well, if not better, known to the servant as to the master. No such situation existed in the instant case. Still further these actions at law on assumption of risk are inapplicable in this admiralty suit, for as Mr. Justice STONE recently said in *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in conformity with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

Assuming the rope was up, the most that can be claimed is that it was notice to libellant not to go into the pool, but it told him nothing else. It may well have meant to him merely that since the pool was only half filled, he should not make the deep dive which respondents urged and which the trial court rejected as the cause of libellant's injuries; and if the rope notification meant only that, libellant should be excused if he believed that there would be no danger in taking the shallow dive he did take. The presence of the rope might also have meant merely that the agitated water in the pool might buffet him about, and in that case libellant should be similarly excused if he believed he could handle himself all right in the water. Libellant did not know and could not possibly know that this ship had an unusual

propensity for pitching, which her chief officer testified she was noted for (p. 633, fol. 1898). The testimony of the Kingsberg boy establishes the effect of this pitching. He said that, "he was swimming around a little, *and the boat took a big lurch, the boat was pitching, and it took a big lurch,* and a wave got in the pool and knocked him against the side on his back" (p. 714, fol. 2142, italics ours). The District Judge referred to libellant's statements that "the ship lurched" and that "the boat swerved" causing him to hit the parietal area of his head against the side of the pool (Opinion, p. 855, fol. 2565); and found that "libellant's head struck against the side of the pool, as he himself testified" (Finding 33, p. 872, fol. 2614).

Land passengers travelling ashore may be reasonably well acquainted with conditions existing on land vehicles, such, for instance, as the dangers incident to riding on a platform, or leaving an arm partially out of the window of a moving train, so as to charge them with full knowledge and appreciation of the risks involved. Conditions at sea or on vessels are another and different matter, and it is settled law that landsmen passengers are neither required nor expected to have knowledge of, or anticipate the effect of the action of the seas or wind on a vessel or the results which may be expected from the rolling or pitching of a vessel. Ocean carriers and the officers and crew of a vessel are, however, required to have such knowledge, and to afford every protection to passengers in making such dangers known to them, and making them known in such a way as to bring home to them a full appreciation of them. *The Arabic* (2 C. C. A.), 50 F. (2d) 96, so held, and respondents (brief, p. 17), attempting to distinguish that case, state that in that case the vessel was "about to enter a hurricane". The facts of the case are contrary to this assertion. The vessel was not about to enter a hurricane, but was actually in a hurricane. We quote from the Dis-

trict Court opinion, to which the Circuit Court of Appeals referred for a correct statement of the facts, that the hurricane caused "tremendous seas", which broke over and enveloped "the entire ship". In such conditions the Circuit Court of Appeals held (Opinion, p. 99) that a warning to a passenger not to sit at the forward end of A deck was not a warning not to sit at the after end of the same deck, because the warning was not such as to "bring home to these inexperienced travellers an appreciation of their danger." Manifestly, hurricane waves of such violence, breaking over the entire ship, produced a danger which was much more obvious to the "Arabic" passengers than the danger resulting from the comparatively mild pitching and rolling of the "California" in the instant case and the resulting agitation of the water in the pool. The mere presence of a rope across the top of the steps, while an indication that the pool was not to be used, was not the type of warning required under the "Arabic" to bring home to libellant an appreciation of the inherent dangers of going into the pool.

Respectfully submitted,

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